

A N
E N Q U I R Y
INTO THE
E X T E N T
OF THE
P O W E R O F J U R I E S,
O N

TRIALS OF INDICTMENTS OR INFORMATIONS,
FOR PUBLISHING
SEDITIONOUS, OR OTHER CRIMINAL
WRITINGS, OR LIBELS,

EXTRACTED FROM
A MISCELLANEOUS COLLECTION OF PAPERS
THAT WERE PUBLISHED IN 1776,

INTITULED,
ADDITIONAL PAPERS CONCERNING THE
PROVINCE OF QUEBEC.

TO WHICH IS ADDED,
A N E N Q U I R Y
INTO THE QUESTION
WHETHER JURIES ARE, OR ARE NOT,
JUDGES OF LAW, AS WELL AS OF FACT;

With a particular Reference to the
C A S E O F L I B E L S.

L O N D O N:
PRINTED FOR J. DEBRETT, OPPOSITE BURLINGTON
HOUSE, PICCADILLY, 1785.

AN ENQUIRY
 INTO THE
 EXISTENCE
 OF THE
 POWER OF JUDGES

IN TRIALS OF INDICTMENTS ON INFORMATION,
 FOR FORGERY,
 SEDITION, OR OTHER CRIMINAL
 WRITINGS OR LIBELS,
 EXTRACTED FROM
 A MISCELLANEOUS COLLECTION OF PAPERS
 THAT WERE PUBLISHED IN 1782,
 ADDITIONAL PAPERS CONCERNING THE
 PROMISE OF QUEEN



TO WHICH IS ADDED
 AN ENQUIRY
 INTO THE QUESTION
 WHETHER JURISPRUDENCE, OR ANY OTHER
 JUDGES OF LAW, AS WELL AS OF FACT,
 WITH A PARTICULAR REFERENCE TO THE
 CASE OF R. B. L. S.

LONDON:
 PRINTED FOR J. BARNETT, OPPOSITE NEWINGTON
 ROAD, NOVEMBER, 1782.

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E N Q U I R Y, &c.

AS I highly esteem and reverence the Trial by Jury, which forms one of the most distinguishing bulwarks of the civil liberty which Englishmen enjoy, I am always anxious to see jurymen exert their power with such discretion and moderation, as to give their fellow-subjects continually fresh cause to rejoice at their being invested with it. And, with this view, I always wish them to avoid two mistakes into which they are sometimes apt to fall. The one is, the giving the plaintiff, in an action of trespass, a greater sum of money, by way of compensation for the injury he has sustained, than is, in their opinion, sufficient for that purpose; which they are sometimes inclined to do through a laudable spirit of indignation against the practice of such oppression as

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is the subject of the complaint before them, and with a design to deter other persons from being guilty of the like. But this is departing from the business that is referred to their decision, and taking upon them to be criminal judges, that inflict punishment by way of terror and example, instead of *assessors*, or *appraiators*, of the magnitude of the particular injury, that is the subject of the action which they are called upon to try. Every instance of an irregularity of this kind in the exercise of their authority, I am fully persuaded, lessens the respect and confidence which the public entertains for their decisions, and thereby tends, in some degree to undermine and weaken their authority. The other manner of deviating from the line of their duty (of which, however, I believe, there are very few instances) is an obstinate resolution to determine a matter of law, that happens to be involved in the issue, or question, referred to their decision, in a manner contrary to the direction of the judge who tries the cause. This, I confess, they have a legal right to do, because the whole matter contained in the issue joined between the parties, whether it be fact or law, is brought before them and referred to their decision. But, surely, common
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sense must teach us, that, if they mean to do justice between the parties, they ought, with respect to such points, (in which they must know themselves to be unskilled) to be guided by the opinion of the judge, or, if they think that may be partial or insufficient, to find a special verdict, to the end that the law may be rightly determined, upon full argument by the judges of the court in which the action was brought.

There is, however, one subject upon which, I imagine, all lovers of public liberty would be inclined to think, that juries ought to have the whole power of determining the matter in contest. The subject, I mean, is the doctrine of seditious libels, and the criminal prosecutions carried on against the writers and publishers of them. These prosecutions are attended with so much danger to that most valuable privilege of English subjects, the *Liberty of the Press*, or the right of animadverting freely, and publickly, (but with a strict adherence to truth,) on the pernicious tendency of publick measures, that one would wish them to be intirely under the controul of *the people themselves*, so as never to be carried on with success

but when *the people* themselves are satisfied of the falsehood and mischievous tendency, or, at least, of the mischievous tendency, of the writings which are the occasion of them. And for this purpose it would be necessary, that the whole determination of these prosecutions should be vested in the juries, who are a part of the people, and may be supposed to entertain the same sentiments with them. For, if the event of these prosecutions was to depend upon the inclinations of the judges, there would be reason to apprehend, that they would meet with success much oftener than would be consistent with that spirit of free enquiry and examination of the measures of government, which is necessary to the correction of the abuses of power, and the preservation of public liberty. Those magistrates must naturally be supposed to be, in some degree, partial to government in cases of this kind, even from respectable motives. Their friendship and their gratitude would often contribute to make them so;—not to mention their self-interest and ambition, which would lead them to hope for future favours from the crown. For, who would be the object of the censures contained in the writings under prosecution? Probably the king's ministers of state, by whose favor and patronage

tronage they, perhaps, would have obtained their offices of judges, and might hope to gain still higher honours for themselves, or preferments for their families. In these cases, therefore, a jury of men of ordinary rank, as, for example, of substantial house-keepers in the city of London, would be much less likely to interpret the intentions of the writers and publishers of such writings in a severe manner, and to consider the tendency of them as of dangerous consequence to the public, than a bench of judges would be: and yet, they would be sufficiently interested in the preservation of the public peace (upon which the continuance of their own liberty, trade, and property, would depend,) to be free from any undue bias of favour towards those persons, if the writings, they had published, had a real and manifest tendency to disturb it: and therefore, upon the whole, they would be a safer and more impartial tribunal for the determination of these matters than the judges. It is reasonable, therefore, that all lovers of public liberty should wish, that the whole power of determining the merits of prosecutions upon these subjects should be vested in the juries. But, in order to its being so, it is by no means necessary, in my apprehension, to depart in any

any degree from the rules above-mentioned, concerning the distinct provinces of judges and juries in the decision of law-suits, and the moral obligation, under which jurymen have been supposed to lie, to keep strictly within the bounds of their own province, without ever presuming to determine any matters of law. All these rules may, as I conceive, be most inviolably adhered to, and yet juries will remain in possession of the whole of this important power of deciding all the matters in contest upon prosecutions for seditious libels. For in these prosecutions all the matters in contest between the crown and the defendant upon an issue of *Not guilty* are *mere matters of fact*, without any, the least, mixture of matters of law. This I shall now endeavour to prove, by considering the several allegations which go to the composition of a criminal charge for writing a seditious libel.

An indictment, or information, against a man for writing a seditious libel, consists of the four following allegations, and of nothing more; to wit, first, That the defendant wrote the paper in question, which is always set forth, word for word, in the indictment or information; secondly, That he published it: thirdly, That he published it with a bad intent; and fourthly,

fourthly, That the paper has a tendency to disturb the public peace. I speak of an indictment, or information, in which the seditious paper is not charged to be false, but only scandalous and malicious, and tending to cause a breach of the peace: For, if the charge of falsehood is inserted in the information, that must be reckoned as a fifth allegation contained in it. This was formerly thought a necessary part of a charge for publishing a seditious libel, but was omitted (for the first time, as I have heard,) in the information brought by Sir Fletcher Norton in 1764, against Mr. Wilkes, for publishing the 45th number of the paper called the North Briton, and has been omitted in most of the informations that have been brought for such publications since that time. The reason for omitting it was, to avoid the altercation which it used constantly to occasion at the bar upon the trial of these informations, and the plausible, if not just, pretence it afforded to the defendant's counsel to insist, that the charges contained in them were not proved. For, though this charge of falsehood used to be inserted in the informations, no attempts were ever made to support it by proof, and the judges, who tried these informations, would neither require the counsel for the crown to prove that the writings in question were false, nor even

even permit the counsel for the defendants to bring proof that they were true ; so that every information, that was brought for a seditious libel, was defectively proved in this article of the falsehood of it. Yet the juries used often to find verdicts for the crown against the defendants, notwithstanding this defect in the proof of the charges brought against them ; and the court of King's-bench used, in consequence of these verdicts, to pass judgments, and inflict punishments, upon them. This, however, was sometimes complained of as an irregular way of proceeding, that was not consistent with the rules of law observed in other cases, and more especially in criminal proceedings, in which, in all other instances, the greatest strictness is required. And it was often made use of at the trial, by the defendant's counsel, as an argument to the jury, to persuade them not to find the defendant guilty, since the counsel for the crown had not made good the whole of the charge against him, but had failed with respect to so material an article as the falsehood of the paper complained of. " For, said they, if the law be really so severe as to consider the publication of a truth as a public crime, and deserving of public punishment, it must, at least, be allowed, that it

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is a less crime than the publication of the same things would be, if they were false; and therefore, the defendant, who is only proved to have published the writings in question without any proof that they are false, ought not to be considered in the same light, and made liable to be punished in the same manner, as if it had been proved that the said writings were false, as he will be, if the jury should find him guilty upon this information." This argument (which I take to be unanswerable,) was frequently made use of by the counsel for the defendants upon the trial of these informations, while the charge of the falsehood of the libel, or writing, complained of, used to be inserted in them: and it, probably, might sometimes prevail with the juries, (notwithstanding the directions of the judges to the contrary,) to find the defendants not guilty. Sir Fletcher Norton, therefore, seeing that the insertion of this charge of falsehood in these informations tended only to hamper the proceedings of the officers of the crown against the publishers of seditious libels, resolved to leave it out for the future in all the informations of that kind of which he was to have the management; in doing which he thought himself sufficiently warranted by the preceding

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declarations

declarations of the judges on various occasions, that this charge of falsehood was *an immaterial* part of every information for a seditious libel, which the prosecutor was not bound to prove, nor the defendant permitted to disprove. And it is said, that Sir Fletcher's successors in office have followed his example. And thus, ever since that prosecution of Mr. Wilkes for the publication of the famous number 45 of the North-Briton, those informations have been drawn up without alledging, that the writings complained of in them were false; and the prosecutions of these offences have gone on, in this respect more smoothly than before, being rid of all the difficulties, which the insertion of that charge of falsehood used to give rise to.

I say then, that in an information for writing and publishing a seditious libel, which is not charged to be false as well as malicious and scandalous, there are only the four allegations before-mentioned, to wit, first, that the defendant wrote it; 2dly, that he published it; 3dly, that he had a bad intention in publishing it; and 4thly, that the paper has a mischievous tendency, or a tendency to produce certain bad effects that are described in the information,

tion, such as alienating the affections of his Majesty's subjects from his Majesty's person and government, or raising jealousies in their minds against the parliament or the courts of justice, and the like. Now these allegations, I conceive, to be all matters of fact. The two first of them, to wit, the having writ the paper, and the having published it, are universally allowed to be so: but the two latter, to wit, the intention of the publisher and the tendency of the paper to produce the mischievous effects described in the information, have been sometimes declared by the judges to be matters of law, or, (as they have expressed it,) inferences of law drawn from the fact of publication, and fit only to be considered and determined by the judges, without the interference of the juries. But this seems to be a modern doctrine of the judges, that has been adopted by them only since the time when Lord Raymond was chief justice of the king's-bench. For, before that time we find many judges, (and those too, some of them men of great character for abilities and learning in the law, and others of them great friends to the royal prerogative, and to a rigorous method of government,) who were of opinion, that both the intention of the writer or publisher of the paper, and the tendency

of the paper to produce certain ill effects, were proper objects of the jury's consideration. And this opinion, I conceive, to be agreeable to the truth, for the following reasons.

In making this enquiry into the true distinction between matters of law and matters of fact; in the law-sense of those words, that is, between matters which are fit only for the consideration of the judges, and matters which are fit objects of the consideration and determination of a jury, I think, we may assume it as an *axiom*, or fundamental maxim, which every body must allow the truth of, that *every thing that can be proved by the testimony of witnesses, is a fit object of the jury's consideration*. For of this sort of evidence, this *external* evidence, they are universally allowed to be the proper judges: and the oath they take, when they are impaneled, "to try the issue joined between the parties and a true verdict give *according to the evidence*," plainly makes them so; and, indeed, it gives them a power of judging and determining according to *other evidence*, besides the testimony of witnesses, when such other evidence is produced before them. But it is sufficient for the present purpose, that they should be allowed to be the true and proper

per judges of all that external evidence that consists in the testimony of witnesses. We must, therefore, enquire, whether, or no, the intention of a man in publishing a writing, and the tendency of the writing to produce a particular ill effect, are matters which are capable of being proved, or disapproved, by the testimony of witnesses. Now it appears to me, that they most manifestly are capable of being so proved, or disapproved. For, first, as to the intention. Who can doubt but that proof may be given by witnesses, that the paper was published with an innocent, or even a good intent, or, in some cases, with an absence of the bad intent alledged in the information, and without which there can be no guilt in the publisher? This may be easily illustrated by the following examples. It is allowed upon these prosecutions, that the delivery of a single paper from one person to another (whether the paper be in print, or manuscript,) is an act of publication. Suppose, therefore, that it could be proved, that the defendant, who was prosecuted for publishing a seditious paper, and who had been already proved to have delivered it to another person, that is, to have published it, was an illiterate man, who could neither write nor read; and that he knew nothing of its

its contents; and that he was a servant to a printer, or bookseller, (as, for instance, their porter,) and had delivered the paper, by his master's order, amongst other papers, or parcels of goods. Certainly this proof would be material to the question, whether the defendant was guilty, or not, of the crime imputed to him by the information, and would be sufficient to shew, that he had not that ill intention in publishing the paper, which was necessary to make him guilty of that crime, and consequently would be a ground for his acquittal. And, as this proof would be extraneous to the paper itself, and could only be given by witnesses, it could be given only to the jury, who are confessedly the judges of all the evidence that is delivered by witnesses in every cause. If, therefore, the information were brought against such servant, or porter, he ought evidently to be acquitted by the jury on account of this absence of the criminal intention imputed to him in the information. If, indeed, the information was brought against the bookseller himself, instead of his porter, and the same proof was to be produced against him as has been just now supposed to have been brought against his porter, to wit, that he had delivered the paper to another person
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with his own hand, but that (though he was skilled in reading and writing,) he had not read it, and did not know its contents at the time he delivered it, this, perhaps, might not be deemed sufficient to excuse him from the charge of publishing it with a criminal intention, because it was his duty, as a master-bookfeller, to attend to the nature of the things he published, and examine them, or cause them to be examined by other proper persons, before he ventured to make them public. I say, it is possible that he might, in such a case, be held guilty of the criminal intention imputed to him in the information; though I must confess, I do not think it quite clear that he ought to be so. And even if, upon an information against a bookfeller for publishing a seditious libel, it should be proved, that the servant, or shopman, of such bookfeller, had delivered a seditious paper to a purchaser, by virtue of his master's general directions to him to attend in the shop and sell books to his customers, such a delivery by the servant might, perhaps, (though I am not without some doubts about it,) be held good presumptive evidence of an intention in the master to publish it, although it should be proved that the master himself knew nothing of the contents of it; because

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it might be said, in this case as well as in the former, that the master had been guilty of a criminal negligence in not previously examining it, or causing it to be examined, before he ventured to make it public. But, if, in this last instance of the delivery of the paper by the servant of the bookseller, it should be proved, not only that the master knew nothing of its contents at the time of its delivery, or publication, but that, at that time, and for a week before the said delivery of it, or even before it had been received into his shop, or ordered to be sent to it, he had been sick in bed, and delirious, and that the whole business of his shop had been conducted by his foreman, he must, I presume, in consequence of such evidence, be esteemed free from the intention of publishing it imputed to him in the information, notwithstanding it had been published in consequence of his general directions to his servant to sell books to his customers; because he would, in such a case, have been incapable, at the time of the publication of such paper, of super-intending the business of his shop, and examining the books that were brought into it, and consequently would not have been guilty of the criminal negligence above-mentioned: and therefore, in such a case, he must, I presume

sume, be acquitted. Now, in all these cases, the proofs here mentioned, (which relate to the intention of the defendant in publishing the paper in question) could be given only by witnesses, and consequently could be given only before a jury: and, therefore, the intention of the defendant in publishing the paper is a proper object of the jury's consideration.

Many more instances might be brought to shew, that the intention of a man in writing, or publishing a paper, (or, indeed, in doing any other act, of which a moral agent is capable,) may be proved, or disproved, by the testimony of witnesses, and consequently is a fit subject for the consideration of a jury. And in most cases it can be proved no other way. Witnesses may prove, that the writer of a libel confessed to them, or declared to them with triumph, that he wrote the paper in question on purpose to raise such or such a disturbance, to cause a mutiny in the army or the fleet, or a resistance to a new tax, or to some other act of government. Or they may prove, that certain praises given to particular persons in the libel, are meant ironically, and contain the severest censures;—that they heard the writer confess he meant them so, and declare

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that he hoped that the world would understand them so;—that they know that the persons spoken of in the paper, are not usually commended for the virtues therein ascribed to them, but are reproached by their enemies for the want of them, and consequently, that the passage is to be understood ironically. Such evidence would be highly proper and useful towards ascertaining the criminal intention of the writer of the paper in question; and without some such evidence, it will often be impossible for either the judge, or jury, rightly to understand the meaning and drift of the paper, or the intention of the writer in publishing it. Now, such kind of evidence, as it can be given only by witnesses, can be given only before a jury: and, therefore, the jury must have a right to determine, how far it tends to prove, or disprove, the point to which it relates, to wit, the criminal intention of the publisher of the paper. This seems to me to be so plain, that I am somewhat afraid my readers will blame me for dwelling so long upon the proof of it, and be apt to say in the words of Cicero, concerning a man who should take great pains to prove that Alexander alone, without the assistance of his soldiers, could not have won the battle of Arbela, *uteris in re non dubia*

dubiâ argumentis non necessariis. And indeed I should not have thought it needed any proof, if I had not seen it denied by persons of great authority, who have asserted, that the criminal intention of the publisher of a libel is not a matter of fact, or matter fit for the consideration of a jury, but merely a matter of law, or an inference of law from the naked fact of publication, which the judges only ought to make. Yet these very persons of authority acknowledge, that the right of determining what the writer of the libel meant by the blanks and initial letters, and the feigned names that are often to be found in seditious libels, belongs to the jury only; which is not very consistent with the said assertion, since these are a part of the writer's intention, which those persons contend to be a mere inference of law. I hope, therefore, upon the whole, that the reader, who dares to make use of his own judgment, and is not disposed *jurare in verba magistri*, will be fully convinced that the intention of a man, in publishing a seditious paper, is a matter of fact, in the law-sense of the word, that is, an object of the evidence of witnesses, and of the consideration and determination

of a jury, as well as the very act of publication itself.

It remains that we examine the fourth and last allegation that is contained in one of these informations, to wit, the tendency of the paper complained of to disturb the public peace, or produce the other ill effects that are set forth in the information. Now this point, I confess, is of a more subtle nature than either of the former three, and may be more easily represented as a mere point of law, or inference of law (as it is called) to be collected from the perusal of the paper itself. And yet, I think, upon a close examination, it will appear to be a matter of fact, or a proper subject for the consideration of a jury, as well as the three former points.

In order to discover whether, or no, the tendency of a particular paper is a matter of fact, or a fit object of the consideration of a jury, we must enquire whether, or no, it can be proved, or disproved, by the testimony of witnesses. For, if it can, it is a matter of fact, and the jury have a right to consider and determine it. Now it is certain that this tendency can in most, if not in all, cases be
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either proved, or disproved, by witnesses; though it may also, in some cases, be collected from the mere perusal of the paper. If the paper contains blanks and initial letters (as most of these papers do,) then it is most evident that, till the meaning of those blanks is ascertained, the tendency of the paper cannot be known; and the right of ascertaining the meaning of these blanks is confessed on all hands to belong to the jury. Therefore in these cases the right of determining the tendency of the paper must belong to the jury. And, if the paper contains no blanks, but is full of allusions to persons of great rank and power described under feigned names by circumstances that are peculiar to them, it is necessary to have witnesses to prove that those circumstances relate to the said persons, and consequently that they are the persons meant to be pointed out to the scorn and indignation of the public by the writer of the paper. Or in such a case, the witnesses may testify that they heard the defendant, the writer of the paper, himself, say that he meant the said persons by the said description, and that he hoped the public would not fail to understand him. Or they may testify that they have often heard him utter the same
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invectives against those persons as are contained in the paper in question, though without confessing that he meant to describe those persons in the said paper, or even that he was the writer of it. All these various kinds of evidence would be admissible in such a case to prove that the allusions in question did relate to the said persons of rank and power; without which relation the said paper would be quite innocent and inoffensive, and have no tendency to disturb the public peace. This tendency therefore of the paper complained of to disturb the public peace, or produce the other bad effects set forth in the information, is in all these cases a thing capable of being proved by witnesses, and which indeed can be proved no other way, and consequently is a fit object of the consideration of a jury, or, in the law-sense of the words, a matter of fact. And even, if we suppose the paper in question to contain neither blanks, nor initial letters, nor allusions to particular persons under feigned names, nor any other sort of disguise whatsoever, (which seldom happens) but to name all the persons it means to speak of by their known names and offices, yet even in this case it is certain that witnesses may be admitted to prove, or disprove, the tendency of
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of the paper, that is, to confirm, or to controul and refute, that internal evidence of its tendency, which, I acknowledge, will, in some degree, result from the bare perusal of it. For witnesses may be brought to prove that it has actually occasioned that disturbance which it seemed to be intended to create, as, for instance, that it has excited a spirit of dissatisfaction in the fleet or the army, or against the administration of justice by the king's courts, or the like. Such evidence of the paper's having produced such ill effects would be the strongest evidence possible of its *tendency* to produce them. And, on the other hand, if a paper was writ that contained a real panegyric upon a great man, couched under the form of a severe invective, ascribing to him those vices from which he was known to be peculiarly exempt, and denying him those virtues in which he was known most to excell, (as, for example, calling the great duke of Marlborough an ill-bred, passionate, tyrannical man, that was utterly ignorant of the art of war, and quite given up to drunkenness, when he was known to be the calmest-tempered, mildest, best-bred gentleman of his age, of great skill in the art of war, and very temperate,) and an information should be brought against the
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writer of it for writing and publishing a fe-
 ditious libel, it would in such a case be lawful
 for the defendant to call witnesses to prove
 that the great man spoken of in the paper was
 so eminently free from the vices imputed to
 him in it, that it could only be understood, by
 all persons who had any knowledge of his cha-
 racter, as a panegyric upon him conveyed un-
 der the form of an invective, and that it had
 been generally so understood by all the world,
 and consequently could have no tendency to
 excite those disturbances which a belief of his
 having those vices would probably occasion.
 And if the jury believed these witnesses, and
 consequently were of opinion that the paper
 had not the pernicious tendency ascribed to it
 in the information, (and which from the mere
 perusal of it, without a knowledge of the cha-
 racter of the person spoken of in it, one would
 be apt to think belonged to it,) it would be
 their duty to find the defendant Not guilty. In
 the next place I will suppose the opposite case
 to the former, to wit, that of a severe in-
 vective against a great man, conveyed under
 the form of a panegyric, commending him
 for virtues which he was generally thought to
 want, without any blanks, initial letters, or
 feigned names. In such a case it would be
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lawful for the prosecutor to produce witnesses to prove that the writer of the paper was a bitter enemy of the great man thus ironically commended in it ;—that they had often heard him express a very bad opinion of him, and deny him the virtues ascribed to him in the paper, and ascribe to him the opposite vices ;—that they themselves therefore understood the paper to be meant ironically, and that they had met with several other persons who had all understood it in the same manner ;——that not only the writer and the other enemies of the great man, but even most of his friends were of opinion that he was not intitled to the praises bestowed on him in the paper, and that they, therefore, on that account, (as well as on account of the known enmity of the writer against the great man,) believed those praises to be meant ironically, and intended to bring him into public odium and contempt ;—and that they actually had produced that effect, and raised a great disgust against him in the persons who were most connected with him, and whose chearful obedience, assistance, and concurrence, were most necessary to his discharging the duties of his great office with success and advantage to the public. If these things were made out to

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the satisfaction of the jury, it would be their duty to find the writer of the paper guilty of publishing a seditious libel, notwithstanding the apparent inoffensiveness of the paper, or its want of tendency to produce any ill effect, so far as its tendency could be collected from the mere perusal of it: so that in this, as well as in all the former instances, the tendency of the paper would be ascertained by the testimony of witnesses, and would consequently be the object of the consideration and determination of the jury. We may therefore, I think, safely conclude that this fourth and last allegation, contained in an information against a man for writing and publishing a seditious paper, or libel, to wit, its tendency to disturb the public peace, or to produce the other bad effects set forth in the information, is a proper object of the consideration and determination of a jury, or, in the law-sense of the phrase, a matter of fact, as well as the three former allegations, of the writing the paper, the publishing it, and the intention with which it was published.

I have hitherto considered those things only as being matters of fact, or objects of a jury's consideration,

consideration, which are capable of being proved, or disproved, by witnesses; because this is the plainest and clearest mark of distinction between them and matters of law that can, as I apprehend, be given. But I conceive that the province of the jury extends a degree further than this, and that they have a right to make all such inferences from facts as may be made without any skill or knowledge of the law, even if no new evidence could be given by witnesses in support of such inferences. For such inferences from facts are merely operations of reason, which is a talent common to all men, to jurymen as well as to judges: and, with respect to the meaning of seditious papers, and the intentions of the publishers of them, and their tendency to produce certain bad effects stated in an information, it often happens that jurymen are better able to make these inferences than judges, even where no evidence should be given by witnesses concerning them; because they have often a more extensive intercourse with the rest of mankind, and a greater knowledge of the business and conversation of the world, than judges (who are men of retired lives, given up to the study of the law, and the discharge of the duties of their respectable

offices,) can be supposed to have. Those inferences therefore ought not to be called inferences of law, but inferences of fact, being a secondary, or subordinate, species of facts, derived from the more simple and direct facts, of which they are the circumstances or properties. For facts may be divided into two classes, which it may perhaps be of some use, in considering this subject, to distinguish by the names of *primary* and *secondary facts*. The former, or *primary*, facts are those plain and simple facts which are the objects of the senses, and are generally proved by the positive testimony of witnesses; such as, whether such a man gave such another a blow, or a wound with a sword, or fired a pistol at him, or whether such an one delivered a particular paper to such another; though even these may sometimes be collected by inference from circumstances. These things are so plainly matters of fact, that no sophistry in the world can make them appear to any body to be matters of law. But the latter, or *secondary*, facts are facts of a more abstract, or remote, kind, and may often be collected from the former by mere reasoning, without the help of external testimony. Such is the intention

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of a man in breaking open and entering a house by night; which, if it be to commit a felony, makes the breaking and entering the house amount to the crime of burglary, which is punished with death; but, if it be to commit a trespass only, (as, for instance, to beat, or to frighten, somebody in the house,) makes it only a misdemeanour, which is punishable by fine and imprisonment. And such is the intention of a writer in writing and publishing a paper against the measures of government; which, if it be to raise a spirit of discontent in the people against their governors, is criminal, and makes the writer and publisher liable to punishment; but, if the paper is intended only as a petition to the king, or any inferior magistrate, praying him to desist from a measure by which the petitioner thinks himself aggrieved, and it is delivered only to the person from whom the redress is prayed, it is an innocent intention, and cannot make the act of publishing the paper the object of punishment. In all these cases the intention of the party accused is a matter of fact, as well as the giving a blow, or a wound with a sword, or firing the pistol, or breaking and entering the house, and the writing and publishing the paper, though it is of a less gross and obvious nature

nature than those other facts, and less capable of being proved by the positive testimony of witnesses, and sometimes can only be collected from those other facts by reasoning upon them; I say, *sometimes*, because for the most part, (as we have seen above,) it will also admit of confirmation and explanation by the testimony of witnesses. These facts therefore, from their being concomitant circumstances of the former, or more simple, facts, may with some propriety be called *secondary* facts, if the former be called *primary* ones. And this distinction may perhaps be useful to prevent these secondary facts from being confounded with matters of law, with which they agree only in this point, to wit, that some degree of reasoning is to be used in discussing and investigating them both. But the difference between the cases is this. The reasoning to be used in the investigation of matters of law is grounded on the knowledge of the law, and can only be used by persons who are possessed of that knowledge; whereas, in the case of these secondary facts, the reasoning to be used is grounded on common sense and a knowledge of the world, and the present transactions of it, and the stories that are told of persons in active life and in offices of great rank

rank and power; all which (as we before observed,) are things that are often better known to jurymen than to judges. And therefore we may conclude, that if no evidence could be produced by witnesses to confirm or disprove these secondary facts, yet the jury would still have a right to judge of them, and to infer them from the primary facts by the exercise of their own reason. But it almost always (or, perhaps, absolutely always) happens that these secondary facts, though they may in some degree be inferred from the primary facts by mere reasoning, yet may be also confirmed, or controuled and disproved, by the positive testimony of witnesses; which distinguishes them still more clearly from matters of law, (in determining which the testimony of witnesses is wholly inadmissible,) and proves them beyond a doubt to be matters of fact, in the law sense of the phrase, or objects of the consideration and determination of a jury, according to the fundamental position above laid down, to wit, that such matters are proper objects of the consideration and determination of a jury as are capable of being proved, or disproved, by the evidence of witnesses. I conclude, therefore, that both *the intention* of the writer and publisher of a paper

paper charged to be a seditious libel, and *the tendency* of the paper to disturb the public peace, or produce the other mischievous effects set forth in the information (which are secondary facts in the sense herein before defined,) are proper objects for the consideration and determination of a jury, or, in the usual law-phrases, matters of fact, as well as the actual writing and publication of it.

If this conclusion is just, the whole business of a jury, upon the trial of an information for writing and publishing a seditious libel, may be said in few words to be this; "To enquire into the conduct of the person charged with having written and published the paper in question, by the means of the evidence of witnesses and of such fair inferences as they, the jury, by their natural reason and good sense, are able to derive from the said evidence; and, having thus discovered what the conduct of the said defendant, with respect to the said charge, has been, to compare it with the conduct imputed to him in the information; and, if they find it to be the same with the conduct imputed to him in the information in all points, to affirm the information, by finding the defendant *guilty* of
the

the charge in the manner and form set forth in the information, (for those are the words used in a verdict of conviction;) and, if they find his conduct, as proved by the evidence, to fall short of the conduct imputed to him in the information in any of the four points above-mentioned, to deny the information, by finding the defendant *Not guilty* of the charge in the manner and form set forth in the information, which are the words used in a verdict of acquittal." This seems to me to be an accurate and plain description of the duty of a jury on the trial of one of these informations.

When the jury have thus exercised their office of enquiring whether the defendant's real conduct has been commensurate with the conduct imputed to him in the information, and have determined that it has been so, by finding him guilty of the charge in the manner and form set forth in the information, there still remains another point to be considered before judgment can be given against the defendant, which is, whether the offence so charged and found by the jury is a public offence, or an object of legal punishment. For, if it shall be made appear by just and

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legal

legal reasonings at the bar, that the writing and publishing the paper in question, though it was done deliberately, and has the tendency ascribed to it in the information, yet is not an offence of such great and public consequence as to be an object of legal punishment, it will be the duty of the court to forbear giving judgment against the defendant, and to dismiss him with impunity, notwithstanding the verdict of conviction found against him by the jury. But this, I apprehend, is a matter which the judges only have a right to determine, either upon a motion made before them on the behalf of the defendant in arrest of judgment, or of their own accord, without such a motion, if they of their own accord come to be of opinion that the facts charged in the information do not constitute a legal offence. For this is really and truly a matter of law, and not a secondary fact, or inference from other facts, nor a matter to which the testimony of witnesses is in any degree applicable, (like the intention of the writer and the tendency of the paper, and other such secondary facts as have been above mentioned,) and therefore is not a fit object of the consideration and determination of a jury. An instance or two will make this

this matter very plain. It is certainly a public and punishable offence to publish a paper tending to disgrace and vilify the king upon the throne, and alienate the affections of his subjects from his person and government, more especially if the imputations thrown out against him are false. This was the offence committed by Doctor Shebbeare in the reign of our late gracious Sovereign, George II. for which, in the opinion of most people, he was deservedly punished. But, if the same abuse were now to be re-published against the same good monarch, it may be doubted whether the publisher of it would be an object of legal punishment, though he would justly incur the censure, and excite the indignation, of all good men that remembered the just and prudent government, and respected the memory of our late sovereign. For, as it can no longer tend to produce the same bad effects as formerly, the monarch, who was the object of it, being no longer among the living, it seems unreasonable to suppose that it could be the object of that legal censure which was grounded on its tendency to produce those bad effects. Yet it might be said, on the other hand, that it still had a tendency to produce *some* bad effects, though not the same as before, nor of so great importance ;

and that, on account of its said tendency to produce these lesser bad effects, it ought still to be the object of some, though a lesser, legal punishment. And to this it might be replied on the behalf of the re-publisher, that every act that *in a small degree* has a tendency to produce some ill effect, ought not to be the object of a legal punishment, and is not so by the law of England;—that, for example, the most scurrilous words spoken, (but not written,) even of a person now alive, are not the object of such punishment, but only of a civil action; and many scurrilous words are not even the object of a civil action, but only of a proceeding in the ecclesiastical court of the bishop of the diocese, carried on *pro salute animæ, et correctione morum*;—that only those actions are the objects of legal punishment in the temporal courts which have a tendency to produce some very pernicious public consequences, and disturb the administration of the government; and that this was not likely to be the effect of a republication of the abuse upon our deceased sovereign; and consequently that such a republication was not the object of legal punishment. Now in all this argument the testimony of witnesses is evidently quite inadmissible; nor can mere reason, or common sense, determine

mine on which side the truth lies: but it is plain that this can only be determined by the principles of the criminal law of England, and the decisions of former judges, upon solemn arguments, in cases of the same kind, or that are nearly similar to it, if such are to be found: and, therefore, it is truly a matter of law, and must be determined by the judges only. But this does not at all interfere with the right that has been above ascribed to the jury, of determining the truth of all the charges contained in the information, or declaring whether, or no, the conduct of the defendant, as proved by the witnesses, agrees, or is commensurate, with the conduct imputed to him in the information, with respect to all the allegations of which the information is composed.

I have now gone through all I had to offer in the way of reason and argument, concerning the extent of the province of the jury in the trial of an information for publishing a seditious libel. I am sensible, I have used a great number of words on this occasion, and even some repetitions, which I knew not well how to avoid, and which, I therefore hope, the reader will excuse; more especially as the reason of my treating this matter so fully

was

was that he might clearly see the grounds upon which I have presumed to differ in opinion from those learned and respectable persons who have declared, that the intention of the publisher of a seditious paper is a matter of law, which the jury have no right to consider. The great respect due to those eminent persons made me at first almost afraid to differ from them, and excited me to examine the subject with as much care and attention as I was capable of bestowing on it; in consequence of which, I became perfectly convinced, that their opinion was not well-grounded. And the same respect to their authority made me afterwards cautious of expressing the opinion I had formed in opposition to that which they had declared, without, at the same time, setting forth, in the fullest manner I could, the reasons upon which I had presumed to differ from them, and adopt the other opinion. And now, that I have ventured to state and maintain that other opinion, I shall (from the same motive of respect to those great persons) endeavour to confirm and support it by the authority of other great persons who formerly held the same high offices of judicature with themselves, opposing judge to judge, and chief justice to chief justice, in at least equal numbers

bers, and marshalling on my side of the argument,

Pares aquilas, et pila minantia pilis;

lest the weight of these great modern authorities should be thought to over-bear the arguments, which, in the course of this enquiry, have been deduced from reason only, in favour of what I take to be the true opinion upon the subject.

In the famous trial of the seven bishops, who were prosecuted in the last year of the reign of king James II. by an information in the court of King's-bench for publishing a seditious libel, Sir Robert Sawyer, (who had been attorney-general,) Mr. Finch, and Mr. Somers, (who was afterwards Lord-chancellor,) were of counsel for the bishops, and Sir Thomas Poways, (the then attorney-general,) and Sir William Williams, (the then solicitor-general,) were of counsel for the Crown, Sir Robert Sawyer contended, "That both the falsity of the paper, and that it was malicious and seditious, were all matters of fact to be proved;" and made this the first head of his speech to the jury: so
that

that here we see, that the falsehood of the paper, the malicious intention of the writer, and the seditious tendency of the paper, are all asserted by this learned lawyer to be matters of fact and objects of the consideration of the jury. His brother-counsel held the same language. Mr. Finch expressed himself thus: "If you, gentlemen, should think
 " that there is evidence to prove the deli-
 " very, by the bishops, of the paper set forth
 " in the information, yet, unless their pre-
 " senting it to the king in private may be
 " said to be a malicious and seditious libel,
 " with an intent to stir up the people to se-
 " dition, and to diminish the King's prero-
 " gative and authority: unless all this can
 " be found, there is no man living can
 " find the bishops guilty upon this informa-
 " tion." This was asserting, that the *ill in-*
tention of stirring up discontents in the minds
 of the people against the King, was an essen-
 tial part of the charge, and one that the jury
 ought to take into their consideration, and
 not leave to the judges as a mere inference of
 law. Mr. Somers spoke next, and said, That
 " the paper could not possibly stir up sedi-
 " tion in the minds of the people, because
 " it was presented to the King alone. False
 " it

" it could not be, because the matter of it
 " was true. There could be nothing of ma-
 " lice: for the occasion was not fought; the
 " thing was pressed upon them. And a libel
 " it could not be, because the intent was in-
 " nocent." The attorney-general, Powys,
 thereon said, " That he should not *now* meddle
 " with what the defendant's counsel had of-
 " fered, because it was not pertinent." And
 then Sir Robert Wright, the chief justice, in-
 terposed with these remarkable words: " Yes,
 " Mr. Attorney, I'll tell you what they offer;
 " which it will lie upon you to give an answer
 " to: they would have you shew how this
 " has disturbed the government, or dimi-
 " nished the King's authority." Here then
 we have king James IId's chief justice of the
 King's-bench expressly declaring in this ce-
 lebrated trial at bar, that the tendency of the
 paper in question, to disturb the government,
 ought to be made out to the satisfaction of
 the jury. Mr. Justice Powell said, " The
 " contrivance and publication are both mat-
 " ters of fact, and, upon issue joined, the
 " jurors are judges of the fact, *as it is laid*
 " in the information." Mr. Justice Hollo-
 way, after the evidence had been summed
 up to the jury, spoke these words: " The
 G " question

“ question is, whether this petition be a li-
 “ bel, or no. Gentlemen, *the end and intent*
 “ of every action *is to be considered*; and like-
 “ wise in this case we are to consider the
 “ nature of the offence that these noble per-
 “ sons are charged with. It was for deli-
 “ vering a petition, which, according as they
 “ have made their defence, was with all hu-
 “ mility and decency that could be: so that,
 “ if there was no *ill intent*, and they were
 “ not men of evil lives, or the like, to de-
 “ liver a petition cannot be a fault, it being
 “ the right of the subject to petition. *If*
 “ *you are satisfied there was an ill intention of*
 “ *sedition, or the like, you ought to find them*
 “ *guilty*: but, if there be nothing in the
 “ case of that kind, I think it is no libel.
 “ *It is left to you, gentlemen*: but that is my
 “ opinion.” The jury are here expressly di-
 rected to consider, whether the bishops had
 any intention of sedition, or not, in presenting
 their petition to the King, and to find them
 guilty, or not guilty, accordingly. So far was
 this judge from thinking, that the intention
 of the defendants was a mere inference of
 law, which the jury had no authority to make.
 Mr. Justice Powell went further still, and
 said, that the falsehood of the paper, as well
 as

as the malicious intention of the publisher of it, and its tendency to disturb the government, ought to be proved: by which we may observe, by the bye, that the modern opinion, "That the falsehood charged upon a libel in an information, is not a material part of the charge, and needs not be proved," was not at that time universally adopted by the judges. His words are as follow: "Truly, I cannot see, for my part, any thing of sedition, or any other crime, fixed upon these reverend fathers. For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the king's counsel, nor any thing as to the malice. Now, gentlemen, the matter of it is before you; you are to consider of it, and it is worth your consideration, &c." Such were the directions of chief Justice Wright, and Justice Holloway, and Justice Powell, at this famous trial: by which we see, that the intention of the defendants in publishing the petition, or paper, and the tendency of the paper to raise discontents in the minds of the King's subjects against his government, were so far from being considered by them as mere inferences of

law, which they, the judges, only had a right to make, that they were recommended to the consideration of the jury as the principal objects, to which it was necessary for them to attend. And chief Justice Holt appears to have been of the same opinion, when he summed up the evidence to the jury upon the trial of the information against Tutchin, the writer and publisher of certain papers, called *The Observators*, in the year 1704. His words, on that occasion, were as follows: “Gentlemen of the Jury, this is an information for publishing libels against the Queen and her government.” And then, after stating the proof of the publication, and reading some passages from *The Observators*, he goes on in this manner: “So that, now you have heard this evidence, you are to consider whether you are satisfied that Mr. Tutchin is guilty of writing, composing, and publishing these Libels. They say they are innocent papers, and that nothing is a Libel but what reflects upon some particular person. But this is a very strange doctrine, to say it is not a libel reflecting on government to endeavour to possess the people that the government is male-administer’d by corrupt persons that are employed

“ ployed in such and such stations, either in
 “ the navy or army. For it is very necessary
 “ for all governments that the people should
 “ have a good opinion of it: and nothing
 “ can be worse than to endeavour to procure
 “ any animosities as to the management of it.
 “ This has been always looked upon as a
 “ crime; and no government can be safe,
 “ without it be punished. Now, *you are to*
 “ *consider*, whether those words, I have read
 “ to you, do not tend to beget an ill opinion
 “ of the administration of the government.”
 Here we find this able Chief Justice expressly
 directing the jury to consider *the tendency* of
 the papers in question, to wit, Whether they
 do not tend to beget an ill opinion of the
 administration of the government? How dif-
 ferent is this conduct from asserting that this
 tendency is a mere inference of law, which
 the judges only have a right to make, with-
 out any concurrence of the jury? From these
 authorities, together with the reasons above
 set forth, I flatter myself, that the reader
 will join with me in concluding, that, upon
 the trial of an information for writing and
 publishing a seditious paper, the jury have a
 right to determine all the particulars of the
 charge, the malicious intention of the writer,
 and

and the mischievous tendency of the paper, as well as the more simple facts of the writing and publication of it, and the meaning of the blanks and feigned names in it; and that the only question, which the judges are to determine, is, whether, if the whole information, with all the allegations contained in it, the malicious intention of the writer, and the mischievous tendency of the paper, be admitted by the defendant, or found by the jury, to be true, the conduct so described and found, is an object of legal censure. I could wish, that even this last particular were also to be determined by the jury: but it rather, I must confess, appears to me to belong to the province of the judges.

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E N Q U I R Y

INTO THE QUESTION,
WHETHER JURIES ARE, OR ARE NOT,
JUDGES OF LAW, AS WELL AS OF FACT;

With a particular Reference to the

C A S E O F L I B E L S.

THE
FUNDAMENTALS
OF
THE
LAW
OF
THE
CONSTITUTION

BY
J. R. Y.

WHETHER IN THEORY OR PRACTICE
OF
THE
LAW
OF
THE
CONSTITUTION

CASES OF
THE
LAW
OF
THE
CONSTITUTION

A N

ENQUIRY, &c.

THE importance and advantages which arise to the liberties of the subject, from trials by jury, are so universally acknowledged, that, to *Englishmen*, it may be presumed, little need be said upon that head. This great privilege has ever been the pride and the boast of our ancestors; it has excited the highest applause, and been the admiration of foreigners; and is justly considered as the greatest security of our lives and properties, and the best defence against tyranny and arbitrary power.

But this great privilege, though too strong to be battered down, may yet be so *undermined* by subtle pretences, as to be ren-
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dered,

dered, in many cases, of very little worth. In particular, some positions have been laid down by certain Lawyers, with respect to the doctrine of libels, which have the most fatal aspect upon the liberty of the press; if they do not tend to a total annihilation of it. Thus it hath sometimes been asserted, from our benches of justice, and again repeated at a period of time not very remote from the present, that jurymen, particularly in the case of libels, are judges of the *Fact only*, and not of the *Law*. That is, that if any man is charged in any information or indictment, with writing, printing, or publishing, any book, pamphlet, or paper, which is in such information or indictment stiled a libel, it is not the business of the jury to enquire, whether such book, pamphlet, or paper, really be a libel, or not; but only into the simple matter of fact, whether the person so charged be the author, printer, or publisher of such book, pamphlet, or paper; and to leave the matter of the libel, the determination whether it be a libel or not, entirely to the Court.

But

But if this principle be once admitted, a very moderate degree of reflection may be sufficient to convince us, that for the people of England then to pretend to be in possession of a freedom of the press, would be ridiculous. They would then have no liberty of the press, but what the judges of the court of King's Bench might think proper to grant them; who, if they were influenced by any the most infamous and corrupt ministry, or by any other motive, might punish as a violator of the laws, any author, printer, or publisher, for writing, printing, or publishing, any book or paper whatever, which they might be displeased with, and think proper to declare a libel. This then being the natural, the unavoidable consequence of this position, That jurymen are not, in these cases, to judge of the law, as well as of the fact; a position replete with the most fatal consequences to the liberties of this kingdom; it is of the highest importance to enquire, whether it has any just foundation in law or in reason.

Now that jurymen have a *legal* right to determine the matter of law, as well as the matter of fact, in the case of libels, and in

other cases, if they think proper, appears very clear.—In *Magna Charta*, cap. 29. it is declared, “ that no freeman shall be-
 “ taken, or imprisoned, nor be disseized of
 “ his freehold, or liberties, or free customs,
 “ or be out-lawed, or any other way destroy-
 “ ed; nor shall we pass upon him, or con-
 “ demn him, but by the lawful judgement
 “ of his peers, &c.” That is, that no man
 can be legally punished, in any way what-
 ever, without a fair trial by a jury of twelve
 men; and without their finding him guilty
 of some crime which the law declares pun-
 ishable. It cannot be supposed to be con-
 sistent with this, that any jury should be ar-
 bitrarily directed to bring any man in guilty,
 when they are not convinced in their own
 minds, whether the action the accused per-
 son is charged with be a crime or not. No
 man (says *Magna Charta*) shall be punished,
 but by *the lawful judgement of his peers*; it fol-
 lows then that they are his proper judges;
 judges not in part only, but of the whole
 matter; judges not only whether he hath
 been guilty of the action alledged against
 him, but whether he hath been guilty of a
crime.

“ A

“ A Jury of twelve men (says Lord Chief Justice Coke) are, by our law, the only proper judges of the matter in issue before them.” And that great oracle of law, Littleton, declares, § 368. “ That if a jury will take upon them the knowledge of the law upon the matter, they may.” To which Coke in his Comment thereupon, agrees; and we have, to the same purpose, the opinion of a very respectable gentleman, who held one of the highest stations in the law, and who was as much distinguished by his knowledge in his profession, as by his integrity and uprightness.

And it is notorious, that, in many cases, juries do constantly judge of matters of law, as well as fact. When persons are indicted for murder, it is a matter of law, whether the action committed, provided the fact be proved, fall under the denomination of *murder*, *man-slaughter*, *chance-medley*, or *self-defence*; and yet these matters of law are determined by the jury. The court inform the jury, what it is that constitutes an action *murder*, *man-slaughter*, &c. and the jury themselves

themselves apply these general principles of law to the particular fact which they are appointed to try, and then bring in their verdict according to their own judgements, "All that the judges do (says an old author *) is but advice, though in matter of law; and it is the jury only that judges one guilty, or not guilty of murder, &c."

And in most general issues, as upon *Not Guilty* pleaded in trespasses, breaches of the peace, or felonies, though it be matter in law whether the party be a trespasser, a breaker of the peace, or a felon; yet the jury do not find the fact of the case by itself, leaving the law to the court; but find the party *guilty* or *not guilty* generally. "The law (says the author just quoted) considering the great burden that lies upon the consciences of jurymen, has favoured them with this liberty. They may take upon them the knowledge of what the law is in the matter, or upon the truth of the fact, as well as of the knowledge of the fact; and so give in a verdict gene-

* See a Guide to English Juries, published in 1682.

" rally,

“ rally, *‘that the defendant is guilty or not.’*”
 And indeed even the very custom of bringing in *special* verdicts, in those nice and intricate cases in which juries will not venture to take upon themselves the knowledge of the law, but chuse to leave it to the determination of the judges, appears to be a proof that, in other cases, they do take upon themselves the determination of it.

Now if it appears to be the custom and the right of juries to determine the matter of law in other matters, what reason can be assigned, why this right should be taken from them in the case of libels only? “ Among other devices (says another old author *) to undermine the rights and power of juries, and render them insignificant, there has been an opinion advanced, That they are only judges of fact, and not at all to consider the law.—Thus some people argue; but it is an apparent trap at once to perjure innocent juries, and render them so far from being of good

* English Liberties, or Free-born Subject's, Inheritance, p. 121.

“ use,

“ use, as to be only tools of oppression, to
 “ ruin and murder their innocent neighbours
 “ with the greater formality.”

It appears clearly from the design of the institution of juries, and from the declarations of the greatest lawyers, that the jurors are the only proper judges of the matters which they are appointed to try: “ Whether——

“ an act was done in such or such a manner,
 “ (says Sir John Hawles *,) or to such or
 “ such an *intent*, the jurors are judges. For
 “ the court is not judge of these matters,
 “ which are evidence to prove or disprove
 “ the thing in issue. And therefore the witnesses are always ordered to *direct their speech to the jury*; they being the proper judges of their testimony. And in all pleas of the crown, the prisoner is said to *put himself for trial upon his country*; which is explained and referred by the clerk of the court, to be meant of the jury, saying to them, *which country you are.*” It

* See a Dialogue between a Barrister at Law and a jury-man.

being then manifestly the right, and the duty of jurymen, to judge entirely of the whole matter before them, it is easy to see what is the proper business of the judge. He is to state the law to the jury, and he may deliver his *opinion*, where the case is difficult; but they are under no kind of obligation to be guided implicitly by that opinion. The office of a judge, Coke observes, is *jus dicere*, not *jus dare*; not to make any law by strains of wit, or forced interpretations; but plainly and impartially to declare the law already established. And the jury are to apply the general rules and maxims of law, or any particular statute or statutes, to the particular fact which is the object of their enquiry. This being the case, the duty of a judge, in the business of libels, as well as of other matters, is very plain: He is to inform the jury what the law says concerning libels, and they are to apply that law to the particular fact in question. This is the method in which the judges act, when they act rightly, in other matters; and in this manner they certainly ought to act in the case of libels. They are not to dictate to the jury

I

what

what verdict they are to bring in ; but only to inform their judgments, by instructing them in such points of law as they, from their situation in life, may reasonably be supposed to be unacquainted with. A judge ought not to say to a jury : " This book, " pamphlet, or paper, is a libel ; and if you " are convinced that this man wrote, print- " ed, or published it, you must find him " guilty." But should first declare to them, what the law says concerning libels ; and then leave them to apply it to the point in question : to enquire whether the particular action with which the accused person is charged, be a breach of the laws ; and then to enquire whether he is guilty of that breach ? And it is therefore clear, that, as the jurors are the proper legal judges of the *whole* matter, they ought not to bring in any man guilty, in any case, upon the mere *ipse dixit* of a judge, nor unless the guilt of the person they are appointed to try, be made evident to *them*. If no evidence is produced sufficient to convince them, that the person has been guilty of a *criminal* action, of an action which is contrary to the laws ; they ought, in such case,

case, to acquit him for want of sufficient evidence; nor ought they ever to bring in a man guilty of a crime, merely because he is proved to have committed the simple fact with which he is charged, unless they are convinced, that the commission of that fact is a crime, a violation of the laws. "If merely in compliance (says Sir John Hawles) "because the judge *says thus, or thus*, a "jury shall give a verdict, though such a "verdict should happen to be right, true, "and just; yet they, being not assured *it is* "so, from their own understanding, are *for-* "sworn, at least in *foro conscientiae*." Nor ought any jury, in libels, or in other cases, to be influenced by either judges, or counsel, who torture sentences in any book, or paper, stiled a libel, into a bad sense, when they are capable of bearing a good one; for it is a maxim in law, that *Verba accipienda sunt in mitiori sensu*.

If a jury are not convinced, that any man is guilty of the *whole* that is exhibited in an indictment against him; at least of all which does materially constitute the offence with which he is charged: they

have a right, nay, they are bound by
 their oaths, to acquit him. " Are you not
 " sworn (says Hawles) *That you will well*
 " *and truly try, and true deliverance make?*
 " There is none of this story of *matter of*
 " *fact* distinguished from *law* in your oath.
 " But your are *well*, that is, *fully, truly*, and
 " *impartially* to try the prisoner. So that if,
 " upon your consciences, and the best of
 " your *understanding*, by what is proved a-
 " gainst him, you find he is guilty of that
 " *crime* wherewith he stands charged; that is,
 " deserving *death*, or such *other punishment* as
 " the law inflicts upon an offence so *deno-*
 " *minated*; then you are to say, he is *guilty*.
 " But if you are not satisfied, that either
 " the *act* he has committed was treason, or
 " other crime, (though it be never so often
 " *called so*) or that the *act* itself, if it were
 " so criminal was not *done*; then what re-
 " mains, but that you are to acquit him?
 " For the end of juries is to preserve men
 " from *oppression*, which may happen, as well
 " by *imposing* or ruining them for that *as a*
 " *crime*, which indeed is *none*, or at least
 " not such, or so great, as is pretended; as
 " by charging them with the commission of
 " that,

“ that, which, in truth, was *not committed*.
 “ And how do you *well and truly try, and*
 “ *true deliverance make*, when indeed you do
 “ but deliver him up to others to be *con-*
 “ *demned*, for that which you do not believe
 “ to be any crime.”

It has been said, that the usual epithets,
 which are in indictments or informations for
 libels, namely, that they are *false, scandalous,*
and malicious; or *seditious*, and *with a design*
to raise insurrections against the government,
&c. are only words of course, and mere
 matter of form, which is not to be attended
 to: They have been compared by great
 personages in the law, to the usual phrase
 in indictments for murder, *being moved by the*
instigation of the devil, and others of that
 kind. But a very little consideration will
 convince any impartial man that this is mere
 sophistry. Every man sees that that phrase
 just mentioned, and others of that sort, are
 mere words of course; but the other epi-
 thets, *false, scandalous, malicious, seditious,*
&c. which are used in informations for li-
 bels, are manifestly *essential words*, which do
 either *make*, or, at least, *aggravate*, the crime
 charged.

charged. If any man is charged, in any information or indictment, with writing, printing, or publishing a *scandalous, false, and malicious*, or *seditious* libel, and no evidence is laid before the jury of any thing but the barely writing, printing, or publishing such a book, can a conscientious and intelligent jury bring in any man guilty upon such evidence? They certainly cannot; for no evidence of *guilt* is laid before them. Writing, publishing, or printing books, are in themselves innocent actions; it must be proved, therefore, that the books themselves contain something, in its own nature, *criminal*, or there can be no *guilt*; and that the jury ought to determine, or they determine nothing. And it is indeed even a matter of *fact*, as well as a matter of *law*, whether any book or paper *be false, scandalous, malicious and seditious*, or not.

The following are some of the arguments made use of by Lord Chief Justice *Jefferys*, in his charge to the jury, on the trial of Sir Samuel Bernardiston, in the court of King's Bench, for a misdemeanour, in *falsely, scandalously, maliciously, and seditiously* writing
and

and publishing certain letters, against the peace of the King, his crown and dignity, &c. These letters were never printed; and all the *publication* which was endeavoured to be proved, was, that they were sent to the *post-office*. “ It hath been objected, (said Jefferys) that inasmuch as the words *falsly*, “ *seditiously*, *maliciously*, *factiously*, and the like “ words, are in the information, they would “ have you believe, that there being no “ evidence of any such thing as *faction*. “ *malice*, and *sedition*, or that the man did “ it maliciously, and advisedly, and sediti- “ ously, (which are the words in the premi- “ ses, as I may call them, or the preamble “ of the information) therefore they must “ be acquitted of that part. Now as to “ that, I told them then, and tell you now, “ gentlemen, that no man living can disco- “ ver the malicious evil designs and inten- “ tions of any other man, so as to give evi- “ dence of them, but by their words and “ actions. No man can prove what I intend “ but by my words and actions. Therefore “ if one doth compass and imagine the “ death of the king, that, by our law, is “ High-treason; but whether or no he be “ guilty

" guilty of this treason, so as to be con-
 " victed of it by another, is not proveable,
 " or discoverable, but by some words or
 " actions, whereby the imagination may be
 " manifested. And therefore my imagin-
 " ing, my compassing, which is private in
 " my own mind, must be submitted to the
 " judgment that reason and the law passeth
 " upon my words or actions; and then the
 " action itself being proved, that discovers
 " with what mind the thing was done.—
 " Suppose any man, without provocation,
 " kills another; the words of the indict-
 " ment are, That he did it maliciously, fe-
 " loniously, not having the fear of God be-
 " fore his eyes, but being moved and se-
 " duced by the instigation of the devil.
 " Now all these things, whether he had the
 " fear of God before his eyes, or not; or whe-
 " ther he was moved by the instigation of the
 " devil, and of his malice fore-thought, or no;
 " these cannot be known, till they come to
 " be proved by the action that is done. So
 " in case any person doth write libels, or
 " publish any expressions which in them-
 " selves carry sedition, and faction, and ill-
 " will towards the government; I can-
 " not

" not tell well how to express it otherwise
 " in his accusation, than by such words, that
 " he did it seditiously, factiously, and mali-
 " ciously. And the proof of the thing it-
 " self, proves the evil mind it was done
 " with. If, then, gentlemen, you believe
 " the defendant, Sir Samuel Bernardiston,
 " did write and publish these letters, that is
 " proof enough of the words maliciously, se-
 " ditiously, and factiously, laid in the infor-
 " mation *."

Arguments similar to these, and almost
 in the same words, have been delivered in
 later times from the same bench. But every
 man must see the fallacy of them. In the
 case Jefferys mentions, of compassing and
 imagining the death of the king, there must
 be a proof of some overt-act, or words, or
 writing, to evidence such a treasonable de-
 sign. In the case of murder, the proof of
 the act itself is a sufficient evidence of guilt;
 because to kill any man, unless it be by
 accident, or in self-defence, is an illegal

* See the trial of Sir Samuel Bernardiston, published
 in 1684, by the authority of Jefferys himself.

and wicked act. But the case of libels is essentially different. If, in a trial for a libel, nothing is proved but what is called the fact, namely, the writing, printing, or publishing of a book or paper, there is no *guilt* of any kind proved; because these things are, in themselves, innocent and indifferent actions. There must, therefore, in any book or paper, which is stiled a malicious or seditious libel, be some evidence of malice or sedition laid before the jury in such book or paper, otherwise the *fact* itself is not proved *to them*; for proving simply, that a man has published a book or paper, and proving that he has published a *seditious* or *malicious libel*, are two distinct things. As writing, printing, and publishing books or papers are, in themselves, innocent and lawful actions; if it be not proved, that such books or papers are *malicious* or *seditious*, there is no evidence of any *guilt* at all. Nor ought it to satisfy a jury, that the judge *tells* them, that any book or paper is a *seditious* or *malicious libel*; they ought to be convinced themselves that it is so, or they cannot honestly and conscientiously pronounce any man guilty, whom

whom they are appointed to try for such an offence, how as

We have one late instance, and that a very noble one, of an English jury's asserting their right, to determine the matter of law, as well as the matter of fact. In 1752, Mr. William Owen, bookseller, was tried, in the court of King's Bench, before Lord Chief Justice Lee, for publishing a pamphlet, intituled, *The Case of Alexander Murray, Esq; in an appeal to the people of Great Britain*. This piece had been voted by the House of Commons to be an *impudent, malicious, scandalous and seditious libel*; and the House had thereupon addressed the King to prosecute the author, printer, and publisher thereof; and the author having left the kingdom, the prosecution fell upon the bookseller. The *fact* of the publication was, in the course of the trial, very clearly proved; and the judge, in summing up the evidence, gave it as his opinion, that the jury *ought* to find the defendant *guilty*; for he thought the publication was fully proved; and if so, they could not *avoid* bringing the defendant in guilty. But

the jury, thinking they had a right to determine the matter of *law*, as well as the matter of *fact*, and being determined to assert that right, did, notwithstanding the opinion of the judge, and the vote of the House of Commons, acquit the bookseller, by bringing him in, *Not guilty*.

Nothing can be more certain, than that a custom of leaving the determination of what books or pamphlets are or are not libels entirely to the judge, must have the most fatal tendency with respect to the liberty of the press. Should, in any future period, the people of England be governed by a corrupt, oppressive, and infamous ministry; which, however far it may be from being the case at present, it is certainly a possible and a supposable case; and any honest Englishman should have courage and patriotism enough to expose the bad measures of such a ministry, and to guard his countrymen against their designs; any performance of this tendency, though written with the most upright and patriotic intentions, would, by such a ministry, be most certainly deemed a *seditious libel*; and it is no
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great improbability to suppose, that they might, in such a case, should a prosecution be commenced, get some justice of the Court of King's Bench, to pronounce that it was so. There have been formerly judges, who were at the beck of the court, and there may be again. If then the jury are not to judge of the law, as well as of the fact, but to follow implicitly the judges opinions; they would have nothing to do in such a case, but to find the author of any such production guilty. And thus a man would be *legally* punished for an action as a crime, for which he would deserve the esteem, and the thanks of all his countrymen.

We have a remarkable instance of this sort in the reign of James the Second. James having made large strides towards the introduction of popery and arbitrary power, and having assembled an army of fifteen thousand men upon Hounslow-heath, in a time of profound peace, Mr. Samuel Johnson, a clergyman, published a paper, addressed to the Protestant officers and soldiers of the army; in which he represented to them the baseness and infamy, of serving as instruments

to destroy the religion and constitution of their country. Whereupon, as this paper was very disagreeable to the court, Mr. Johnson was prosecuted in the court of King's Bench, for writing a *seditious libel*, and his jury thought proper to bring him in *guilty*; upon which he was sentenced to stand three times in the pillory, to be whipped from Newgate to Tyburn, and to pay a fine of five hundred marks; which sentence, after he had been solemnly degraded, was accordingly executed with great rigour.

It is obvious, that if the position be admitted, that judges only are to determine the matter of law in the case of libels; every man is liable to prosecution, and to punishment, for writing, printing, or publishing any book or paper whatever, which any judge of the Court of King's Bench may think proper to deem a libel, by whatever motives he may be actuated. No man could write or publish any thing of a political kind without manifest danger, however upright his intentions might be in so doing. Ministers of state will ever deem all writings, which oppose their measures, *libellous* and *seditious*;

seditions; and the more truth there is in any publications of that sort, the more commonly will they be irritated by them. If then the power of pronouncing what are libels, and what are not, rests solely in the breasts of the judges, can it be a difficult matter for a minister to punish any man, who writes with any degree of freedom upon the public measures? Or is it impossible to suppose, that a bad minister may find some judge of the Court of King's Bench, who may be influenced by the court? We have had a Jefferys preside in that court, and we may have again. - And is there any Englishman, who thinks the liberty of the press of the highest national importance, who can think calmly of such a power being lodged in such hands?

In short, the most innocent book or paper whatever, may be deemed a libel. Baxter's Paraphrase on the New Testament was deemed, in the Court of King's Bench, a *seditions libel*; and the author was punished as a *seditions libeller*. No impartial man, who ever read *the Crisis* of Sir Richard Steele, can ever think it consistent with any just pretensions

sions to the freedom of the press, that such a performance should be deemed punishable ; and yet the *Crisis* was voted a libel, and the author expelled the House of Commons for writing it. How ridiculous is it to pretend, that the people of England have the liberty of the press, if it be admitted, that the judges can pronounce any book a libel that they think proper ? Must not every intelligent foreigner laugh at such a pretension ? It is true, authors and booksellers may, notwithstanding, write and publish what they please ; but if this principle be admitted, they must always do it *at their peril*.

If then this be the certain consequence of admitting this proposition, That juries are only judges of matters of *fact* and not of the matter of *law*, as it most evidently appears to be, must not every friend to liberty be alarmed at so dangerous a position ? and more especially when it is advanced from our benches of justice, and by those whose eloquence and abilities render them the more capable of maintaining a false hypothesis ? But as it appears manifestly to be inconsistent with the original design and
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institution of juries, to suppose that they have not a right to judge of *Law*, as well as *Fact*; as it appears to have been the opinion of some of the best and ablest lawyers, that they have that right; as it is notorious, that, in many cases, such as in trials for murder, &c. juries do constantly determine the law as well as the fact; as it is certain, that they have actually exerted this right in the case of libels, and other similar cases, when they have had spirit and honesty enough to do their duty; and as the leaving the determination of the matter of law, to the judges only, is manifestly attended with consequences so fatal to the liberty of the press; surely a right of such importance ought not to be given up upon the mere *dictum* of any lawyer, how great, how eminent, how powerful soever.

It is easy to conceive why some judges may have been willing to advance this position, because it tends to encrease their power; and may enable them the better, on many occasions to carry a favourite point. But the bare assertion of any judge, any more than of an inferior lawyer, does not

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make law. And certainly the mere opinions and assertions of many lawyers, if many could be produced, ought not to balance against the consequences, which seem naturally to result from admitting the doctrine which has here been controverted ; especially if those opinions do not appear to be really founded in law ; but to be contrary to the spirit of it, and to those principles of right reason, upon which all law is, or ought to be, founded.

Juries have the more reason to be upon their guard in cases of this nature, against any incroachments on their rights, since the custom of prosecutions, in the Court of King's Bench, by *informations* only, in criminal cases, has unhappily arisen to such a height ; by which means the subject is drawn into hazard of liberty and estate, without presentment or indictment of a Grand-jury ; and is thereby deprived of that great and good outguard of his liberty and property, the inquest by oath of twelve men, before he should be brought to trial.

If the principles which have been advanced in this little piece are just ; and if the
confe-

consequences which have been pointed out, do, in reality, naturally result from the doctrine which hath been here opposed ; every uncorrupted Englishman, every friend to freedom, of whatever party, must be alarmed at the propagation of it ; and be heartily and warmly disposed to oppose whatever hath a tendency so fatal to the public liberty,

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considerations which have been pointed out,
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cisions which have been opposed; every
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at the propagation of it; and be heartily and
warmly opposed to whatever has a
tendency to limit the liberty.



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